Filed 1/11/13 P. v.Wilson CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TYRONE ALLEN WILSON, Defendant and Appellant.	Consolidated Case Nos. F062533 & F062619 (Super. Ct. Nos. BF123662A & BF131206A) **ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]**

Appellant Tyrone Allen Wilson filed a petition for rehearing on January 4, 2013. The petition requested rehearing on the ground that in *People v. Rodriguez* (Dec. 27, 2012, S187680) ___ Cal.4th ___ [2012 WL 6699638] (*Rodriguez*), the California Supreme Court rejected the reasoning, and overruled the cases, on the basis of which we affirmed Wilson's conviction of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)). Wilson is correct. We will deny rehearing and modify our opinion to conform to the Supreme Court's holding. The modification alters the judgment, as we will be reversing Wilson's conviction on count 3.

The unpublished opinion filed herein on December 17, 2012, is modified in the following particulars. (The page numbers referenced in this order are based on the

pagination in the hard copy of the original opinion filed in the clerk's office, a copy of which is attached to this order for reference.)

1. Page 2: After the second full paragraph, insert the following new paragraph:

> Under the California Supreme Court's recent opinion in *People v. Rodriguez* (Dec. 27, 2012, S187680) ___ Cal.4th ___ [2012 WL 6699638] (*Rodriguez*), Wilson is correct that his conviction of active participation in a criminal street gang must be reversed. *Rodriguez* held that the offense cannot be based on an underlying offense committed by a single gang member acting alone; instead, there must be at least two individuals acting in concert. There were no other gang members involved in Wilson's underlying offenses, so the conviction cannot be sustained. Wilson's sentence on this offense also was stayed.

2. Page 12: Delete the entire section (running from the second full paragraph on page 12 to the end of page 15) headed "***A. Section 186.22, subdivision (a)***." Replace it with the following text:

> ***A. Section 186.22, subdivision (a)***
>
> Section 186.22, subdivision (a), provides:
>
> > "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."
>
> Wilson argues that the element of willfully promoting, furthering, or assisting in any felonious criminal conduct by members of the gang requires a finding that the defendant committed an underlying offense in concert with at least one gang member. As there was no evidence that any other gang member was involved in Wilson's drug offense, he contends that the evidence was not sufficient to support the conviction.
>
> In *Rodriguez*, the Supreme Court adopted the view for which Wilson argues. The court stated:

> "Section 186.22(a) speaks of 'criminal conduct by members of that gang.' (Italics added.) '[M]embers' is a plural noun. The word 'promotes, furthers or assists' are the verbs describing the defendant's acts, which must be performed willfully. The phrase 'any felonious criminal conduct' is the direct object of those verbs. The prepositional phrase 'by members of that gang' indicates who performs the felonious criminal conduct. Therefore, to satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help members of his gang commit felonious criminal conduct. The plain meaning of section 186.22(a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member." (*Rodriguez, supra*, ___ Cal.4th ___ [2012 WL 6699638 at p. 3].)

The Supreme Court overruled *People v. Salcido* (2007) 149 Cal.App.4th 356 and *People v. Sanchez* (2009) 179 Cal.App.4th 1297, which had held that a violation of section 186.22, subdivision (a), could be based on an underlying offense that the defendant committed alone. (*Rodriguez, supra*, ___ Cal.4th ___ [2012 WL 6699638 at pp. 6-7].)

In light of *Rodriguez*, it is clear that the evidence cannot support Wilson's conviction under section 186.22, subdivision (a). That conviction is reversed.

3. Page 16: Delete the entire section (running from the top of page 16 to the end of the partial paragraph at the top of page 17) headed "***B. Section 186.22, subdivision (b)***." Replace it with the following text:

B. Section 186.22, subdivision (b)

Section 186.22, subdivision (b)(1), provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …." Wilson argues that the prosecution failed to present sufficient evidence to prove the enhancement allegations against him. We hold that the evidence was sufficient.

Wilson first argues that the evidence did not prove that he committed the current offense for the benefit of, at the direction of, or in association

with a gang. Officer Champness testified that if a Country Boy Crips member possessed cocaine base for sale, the offense would be for the benefit of, at the direction of, or in association with the Country Boy Crips, but Wilson argues that this testimony is not substantial evidence that *he* possessed the cocaine base for sale for the benefit of, at the direction of, or in association with the Country Boy Crips, because it was not proved that he was a member of the gang.

We disagree. Wilson claimed gang membership seven times to booking officers, most recently in 2008, 21 months before his arrest in this case. During those 21 months, Wilson was ordered to spend a year in county jail as a condition of probation in case No. BF123662A, so he had even fewer than 21 months of freedom between the time of his last admission of gang membership and the commission of the current offense. Further, there was physical evidence of Wilson's current gang participation at the scene of the current offense itself: the sign and note bearing Wilson's gang moniker, Holiday. The possession-for-sale offense was a characteristic gang crime, according to the police expert. When confronted with a seven-time admitted gang member, bearing gang tattoos, committing a characteristic gang crime in a room where a sign and another writing showed his gang moniker, the jury could reasonably find that the defendant was a current, active participant in a gang.

Wilson argues that the evidence that he claimed gang membership seven times while being booked into jail shows nothing because he "could have claimed to be a County Boy Crip (if in fact this is what he actually claimed as opposed to what was written down or how it was interpreted by Officer Champness) out of an abundance of caution for his safety due to being acquainted with some Country Boy Crips, and not because he was a member of the gang himself. This is the logical inference because [Wilson] has never been a documented gang member."

The idea that Wilson claimed he was a Country Boy Crip even though he was not is contradicted by the other evidence. Wilson had gang tattoos on his arms and a sign and a note with his gang moniker in his room. As for not being a "documented gang member," Wilson appears to mean that he was never before ordered to register as a gang member. There is, of course, no requirement that a defendant must be a registered gang member before his sentence can be enhanced under section 186.22, subdivision (b).

Wilson says the tattoos on his arms do not show gang membership because "[i]t appears just as likely that this was actually a tattoo of a former girlfriend's initials." It is not just as likely. The prosecution presented

photographs of the tattoos; opinion testimony that the letters were "C" and "B" and that many County Boy Crips had tattoos like these; and a photograph of another Country Boy Crip with similar tattoos in the same places on his arms. On the other side of the balance was only defense counsel's opinion that the "C" looked like a "G" and a witness's remark that Wilson once had a girlfriend named Gina, whose last name was unknown. The evidence that the tattoos were indicative of Country Boy Crips membership was strong, and the evidence that they stood for someone named Gina B. was nearly nonexistent.

Wilson next argues that the prosecution failed to show by substantial evidence that he acted with the specific intent to promote, further, or assist in any criminal conduct by gang members. His reasoning is similar to the reasoning that prevailed on the section 186.22, subdivision (a), issue in *Rodriguez*: the reference to "conduct by gang members" appears to indicate that the statute applies only if multiple gang members are involved in the underlying offense. The *Rodriguez* court, however, explicitly denied that the reasoning of that case applies to section 186.22, subdivision (b)(1), enhancements. It stated:

> "A lone gang member who commits a felony … would not be protected from having that felony enhanced by section 186.22(b)(1), which applies to 'any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members ….' Because the gang enhancement under section 186.22(b)(1) requires both that the felony be gang related and that the defendant act with a specific intent to promote, further or assist the gang, these requirements provide a nexus to gang activity sufficient to alleviate due process concerns." (*Rodriguez, supra*, ___ Cal.4th ___ [2012 WL 6699638, at p. 9].)

4. Page 21: Delete the first sentence of the disposition. Replace it with the following:

> The convictions on count 2, maintaining a place for selling, giving away, or using a controlled substance, and count 3, active participation in a criminal street gang, are reversed.

Except for the modifications set forth in this order, the opinion previously filed remains unchanged.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Gomes, J

_____
Poochigian, J

Filed 12/17/12 P. v. Wilson CA5 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TYRONE ALLEN WILSON, Defendant and Appellant.	Consolidated Case Nos. F062533 & F062619 (Super. Ct. Nos. BF123662A & BF131206A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Cheryl Rae Anderson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Tyrone Allen Wilson was convicted in case No. BF131206A of possessing cocaine base for sale and maintaining a place for the purpose of selling, using, or giving away a controlled substance. Gang enhancements for those two counts were found true, and Wilson also was convicted of the substantive offense of gang

participation. In case No. BF123662A, the court found that Wilson violated his probation in a prior case by committing the current offenses. It sentenced him to a total of 10 years.

In this appeal, Wilson argues that there was insufficient evidence to support the conviction of maintaining a place for selling a controlled substance, the conviction of participating in a gang, or the gang enhancements. He also challenges several of the details of his sentence.

We agree with Wilson that the evidence is not sufficient to sustain the maintaining-a-place conviction. There was no evidence that Wilson used the hotel room in which his drugs were found for any activities other than storing and packaging the drugs. We also agree with Wilson that the court erred when it suspended his driver's license for one year on the ground that there was vehicle use incidental to the offenses. The only connection between Wilson's vehicle use and the offenses is that he was driving with the key to the hotel room in his pocket when the police pulled him over. These holdings will not impact the actual time served by Wilson or his ability to drive, as the sentence for the maintaining-a-place offense was stayed by the trial court and the one-year license-suspension period has already expired.

In addition, we order technical corrections to the abstract of judgment related to presentence conduct credits and to the date of conviction in the probation case. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORIES

On the evening of March 2, 2010, Bakersfield police officers Tim Diaz and Pete Beagley pulled over a car with tinted windows and a missing rear license plate. Wilson was driving the car. The officers searched him, and in his pockets they found $425 in cash and a key card bearing the name of a hotel chain, America's Best Inn.

Diaz and Beagley turned Wilson over to another officer and proceeded to the America's Best Inn at 8230 East Brundage Lane. The desk clerk told them that Wilson was staying in room 221. The registration form on file at the front desk for room 221 showed that the room was registered to Scyotria Williams, Wilson's girlfriend. Copies of

Wilson's and Williams's driver's licenses were attached to the form. Williams's name was misspelled "Wiliams" on the form.

The card the officers found in Wilson's pocket unlocked the door to room 221. The officers found, hidden under a nightstand, a bag containing a substance that was later determined to be 266.8 grams of cocaine base. Behind a microwave oven they found a digital gram scale with white residue on the weighing platform. A backpack filled with cash was behind an armchair. There was $11,400 in the backpack, sorted into bundles by denomination. All but $1,600 was in denominations smaller than $50. On a desk were two boxes of clear plastic sandwich baggies. The desk drawer contained a razor blade with white residue on it. Beneath the desk was a trash can; inside were several torn plastic baggies. Pieces of plastic bags with torn corners were on the floor beside the trash can. On the floor of the closet was a black plastic bag with its corners torn off.

Also behind the microwave was a receipt with numbers written on it, and the words, "I love you, Holiday." A sign reading "Holiday" was on the bed or against the wall. Bakersfield police officers knew Wilson by the gang moniker Holiday. On previous occasions when he was incarcerated, Wilson had identified himself as a member of the Country Boy Crips criminal street gang and had asked to be housed apart from rival gang members. He had the letter C tattooed on the back of his left arm and the letter B tattooed on the back of his right arm.

The officers also found clothing, a shoulder bag, sunglasses, food, toiletries, and other items in the room. From these, they inferred that at least two people, a man and a woman, had been staying in the room. When interviewed by police, Wilson denied any knowledge of the hotel room or its contents. He said he had never been to that hotel and it was impossible that the hotel would have a copy of his driver's license.

At the time of the current offenses, Wilson was on probation in case No. BF123662A. In that case, in 2008, Wilson pleaded no contest to one count of being a felon in possession of a firearm. (Former Pen. Code, § 12021, subd. (a)(1).) He received

three years' probation, including one year in county jail. On March 9, 2010, Wilson was arraigned on a violation of probation based on the facts of the current offenses.

The district attorney filed an information in case No. BF131206A on August 6, 2010, charging three counts: (1) possessing cocaine base for sale (Health & Saf. Code, § 11351.5); (2) maintaining a place for the purpose of unlawfully selling, giving away, or using a controlled substance (Health & Saf. Code, § 11366); and (3) actively participating in a criminal street gang (Pen. Code, § 186.22, subd. (a)).[1] For sentence-enhancement purposes on counts one and two, the information alleged that Wilson committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b).) The information also alleged for sentence-enhancement purposes on each count that Wilson had served two prior prison terms. (§ 667.5, subd. (b).)

At trial, police officers testified about the traffic stop and the search of the hotel room as described above. Rashmi Mulgi, one of the owners and managers of the hotel, testified that Wilson was staying in room 221 on March 2, 2010, and that he and Williams had been staying at the hotel for about a month.

Officer Beagley, who had made many arrests for possession of controlled substances, gave opinion testimony about illegal drugs. He said that one gram of cocaine base has a street-level value of about $100. For street sales, a large rock of cocaine base is usually divided by means of a razor blade into small pieces worth $10 each and packaged in bindles. A bindle is usually made from a corner of a plastic bag. A small rock of cocaine base is placed in the corner of the bag and the corner is then twisted off and tied or melted closed. Sandwich bags or grocery bags can be used. Answering a hypothetical question based on the evidence found in room 221, Beagley opined that whoever possessed the drugs would be in possession of them for the purpose of selling them.

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[1]Further statutory references are to the Penal Code, unless otherwise indicated.

Bakersfield police officer Daniel Champness testified as an expert on gangs. The parties stipulated that the Country Boy Crips are a criminal street gang within the meaning of section 186.22. Champness opined that Wilson was an active participant in the County Boy Crips on March 2, 2010. He mentioned a number of facts to support this opinion. Wilson had a "C" and a "B" tattooed on the backs of his arms, which Champness said he had seen on other Country Boy Crips members—and on no one else—and which stood for "Country Boy." Defense counsel opined that the "C" looked like a "G."

The jury was shown a photograph of another Country Boy Crips member with similar tattoos on his arms. Wilson was known to officers in the department as Holiday, which Champness opined was a gang moniker. On seven occasions when Wilson was booked at the county jail between 1999 and 2008, Wilson claimed he was a Country Boy Crip and asked to be kept away from members of the Bloods gang. In addition:

- In 2003, Wilson was arrested with a controlled substance and cash in his possession, both in quantities that led officers to conclude he possessed the drugs for sale.
- On February 13, 2005, Wilson was stopped at D&A Market, a Country Boy hangout in Country Boy territory, where illegal drugs were sold.
- Wilson was identified as a suspect who, on February 18, 2005, held two women at gunpoint in an apartment, demanding to know what happened to some money.
- The same day, at a different apartment, Wilson conducted an illegal drug transaction.
- The following day, February 19, 2005, Wilson was stopped while driving in Country Boy territory with several other known Country Boy Crips and two firearms in the car. One of the other gang members called Wilson by his gang moniker, Holiday.
- On March 19, 2005, Wilson was arrested while in Country Boy territory and in the company of another gang member. The other gang member was in possession of an illegal drug.

- On November 1, 2006, a shooting took place at the Regency Bowling Alley, a place known to police as a Country Boy Crips hangout. Wilson was interviewed by police because he had connections to a person who was arrested for the shooting and because a witness described a person matching Wilson's general description as being present.
- On February 23, 2007, police searched Wilson's home and found a digital scale with a residue of a controlled substance on it.
- On May 31, 2008, officers searched a home and found "indications" that Wilson had sold drugs there.

Champness also opined that Wilson possessed the drugs in room 221 and maintained the room as a place for selling drugs for the benefit of and in association with his gang. In support of this, he testified that illegal drug sales are a common crime among the Country Boy Crips. Street-level sales of the drugs "are primarily controlled by these gang members." The America's Best Inn was outside Country Boy Crips territory, but Champness stated that there was a trend among the County Boy Crips to work outside their territory to avoid prosecution. Money from drug sales often is "funneled back into the gang," and used to pay for guns, bail, more drugs to sell, and apartments or houses to use as safe houses or for drug storage. Even when drug profits are not returned to the gang, the sales benefit the gang because they allow "that individual who is selling to continue in a lifestyle—a gangster lifestyle" and to conduct other illegal activities, enhancing the member's reputation and the gang's reputation. Wilson's activities at the hotel room would promote criminal gang conduct by providing "a place to distribute or at least package the very narcotics that they are selling, the monies generated from that benefiting the gang." Champness said many Country Boy Crips members had told him they were aware of the gang's criminal activities.

On cross-examination, Champness testified that people sometimes leave gangs. On redirect, however, he said that if a person who was a gang member in the past

commits a "crime that is consistent with a gang crime" now, the person is probably still a gang member.

Jacob Gallegos testified for the defense. He said that a couple of days after Martin Luther King Day in 2010 (i.e., in January, over a month before police searched Wilson's room), he stayed for two nights at a hotel on East Brundage Lane at Weedpatch Highway. On the second night, a man and woman who were not Wilson and Williams knocked on Gallegos's door. The man said the police were searching his room and had told him to stay away during the search. He offered Gallegos $20 to drive him to a 7-Eleven. Gallegos accepted. When he returned, he saw police officers searching a room.

Devon Steen testified for the defense. He had been Wilson's friend for 13 years. Steen believed Wilson had always held down a job and was a family man. Steen testified that gang members were bad people with no morals; he believed Wilson shared this view and was not a gang member. Steen had never heard of the Country Boy Crips. He had never seen the "C" and "B" tattoos on the backs of Wilson's arms, although the two had often lifted weights together. Steen had never seen or heard of Williams; Wilson spoke to him only of Wilson's children's mother. He remembered that, years ago, Wilson had a girlfriend named Gina.

The jury found Wilson guilty of all counts and found the gang-enhancement allegations true. The court found one of the prior-prison-term allegations true and dismissed the other. The court also found Wilson to have violated his probation in case No. BF123662A.

Wilson received an aggregate sentence of 10 years, consisting of five years for possessing cocaine base for sale, four years for the gang enhancement on that count, and one year for the prior-prison-term enhancement on that count. For maintaining a place for selling, giving away, or using a controlled substance, the court imposed a sentence of three years plus four years for the gang enhancement, all stayed under section 654. For the substantive gang-participation offense, the court imposed a sentence of three years,

stayed under section 654. A term of two years for the underlying offense in the probation case also was imposed, to be served concurrently with the term for the possession count.

DISCUSSION

I. Sufficiency of evidence of maintaining place for selling, using, or giving away drugs

Wilson argues that insufficient evidence was presented at trial to prove the elements of Health and Safety Code section 11366, maintaining a place for the purpose of unlawfully selling, giving away, or using a controlled substance. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

The elements of the maintaining-a-place offense are that the defendant (a) opened or maintained a place (b) with a purpose of continuously or repeatedly using it for selling, giving away, or using a controlled substance. (*People v. Hawkins* (2004) 124 Cal.App.4th 675, 680; *People v. Horn* (1960) 187 Cal.App.2d 68, 73; *People v. Holland* (1958) 158 Cal.App.2d 583, 588-589.) Evidence of a single instance of drug use or sales at the place, without circumstances supporting a reasonable inference that the place was used for the prohibited purposes continuously or repetitively, does not suffice to sustain a conviction. (*People v. Hawkins, supra*, at p. 682; *People v. Shoals* (1992) 8 Cal.App.4th 475, 491-492; *People v. Horn, supra,* at pp. 73-74; *People v. Holland, supra,* at pp. 588-589.)

Wilson argues that, although the evidence found in room 221 "supports a conclusion that the cocaine base in the motel room was possessed for sale, it does not suffice to establish that [Wilson], or anyone else, sold cocaine base on a continuous and repeated basis in this motel room." He says, "there were no indicia that [Wilson], or anyone else, made a single drug sale, let alone repeated and continuous drug sales out of

room 221. There was no evidence of persons visiting the room. Nor was there any evidence of the use of lookouts or passwords showing an attempt to restrict access to potential customers. Similarly, there was no evidence that anyone was given drugs from the room on a single occasion, let alone repeatedly and continuously. Nor was there evidence that anyone was using drugs in the room repeatedly or continuously." Consequently, Wilson argues, the prosecution failed to prove that he had a purpose of continuously or repeatedly using the room to sell, give away, or use a controlled substance.

The People's discussion of the evidence supporting the maintaining-a-place charge is as follows:

> "Although there were boxes of plastic baggies in room 221, presumably for the future packaging of cocaine base, the 266.8 grams of cocaine base, enough for 3,000 'usable amounts' [citation], was not conveniently packaged in small, portable bindles. In addition to the unpackaged, large quantity of cocaine base, there was a digital gram scale, some razor blades, and additional plastic bags. Some of the plastic bags had been torn and discarded in the room, indicating that some of the cocaine base had been pre-bindled, sold, and then used in the room. Cocaine base residue was found on the razor blades and the digital scale, again suggesting that sales or use had occurred in the room. [Wilson's] drug money was also located in the room. Although there was no evidence of other persons visiting the room or any direct evidence of sales in the room, the surrounding circumstances, and particularly the presence of drug paraphernalia and drug residue in the room, indicate that the sales and use of the cocaine base took place in room 221, not elsewhere. [¶] Significantly, [Wilson] did not possess any bindles of cocaine base on his person or in his car when he was contacted by law enforcement. Had [Wilson] possessed such bindles, it might have suggested that [he] intended to sell the cocaine base on the streets and not in room 221. But the fact that [Wilson] did not possess cocaine base outside of room 221 lends further support to the finding that the sales occurred in the hotel room. [¶] In light of [Wilson's] cocaine base possession and the other circumstances pointing to his culpability, there was ample evidence to support the jury's determination that [Wilson] violated Health and Safety Code section 11366."

Wilson has the better of this dispute. The evidence showed clearly that room 221 was being used to store and package cocaine base for sale, but it showed nothing further.

The fact that some of the cocaine base had not yet been packaged is not evidence that it was going to be sold in the room. It is at least as likely that it would be packaged in the room and sold elsewhere. The presence of a scale and razor blades with cocaine base particles adhering to them simply showed that those items had already been used for dividing and measuring drugs for packaging. It shows nothing one way or the other about whether drug sales or use took place in the room. That "[s]ome of the plastic bags had been torn and discarded in the room" did not "indicat[e] that some of the cocaine base had been pre-bindled, sold and then used in the room." The evidence was that bags with the corners torn off were found in the room; the police expert testified that this was an indication that packaging had taken place, since corners of bags are used to package cocaine base. None of the testimony indicated that empty corners of bags, which once might have been bindles, were found. The People's reference to "drug paraphernalia" can only be a reference to the scale, razor blades, and packaging materials. No pipes, for example, were found. The "residue" the people refer to is the white powder on the scale and razor blades; no burned residue was found. The fact that Wilson had no bindles on his person when arrested is not evidence of anything, except that he was not transporting his product at that moment.

The $11,400, mostly in small bills, indicated that Wilson had already sold a substantial quantity of drugs. Combined with the lack of evidence of large numbers of visitors to the room, the cash suggests that Wilson was selling elsewhere.

The evidence the People point to shows *at the most* that two theories are equally likely to be true: that Wilson used the room just for storing and packaging drugs, and that he also conducted a sales operation there. This is not enough. The jury was properly instructed with CALJIC No. 2.01: "[I]f the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt."

People v. Shoals, supra, 8 Cal.App.4th 475, is helpful. Shoals was convicted of possession of cocaine base for sale and maintaining a place for selling or using a controlled substance. (*Id.* at p. 482.) The evidence was that Shoals's hotel room contained 21 baggies of cocaine base; $533.32 in cash; personal property indicating that a man, woman and child were living there; and testimony that the hotel's switchboard handled heavy telephone traffic to and from the room day and night. (*Id.* at pp. 481-482.) The Court of Appeal held that there was insufficient evidence to sustain the maintaining-a-place conviction. (*Id.* at p. 493.) It stated that possession of a large quantity of narcotics is not sufficient to establish the maintaining-a-place offense. (*Id.* at p. 491.) There is no presumption "that the place where the controlled substance is kept was opened or maintained as a place for its unlawful sale, use, or gift." (*Id.* at p. 492.) There was evidence that the room was a home for the man, woman and child; there was no evidence of people visiting the room in unusual numbers or at unusual times; and there was no evidence of people under the influence on or around the premises, lookouts, or use of passwords, drug paraphernalia or drug residue. (*Ibid.*) The present case is similar. The evidence showed that Wilson had been living in the room for about a month with his girlfriend, and that he had been keeping and packaging drugs there. Apart from this, there were no indicia of continuous or repeated acts of use, gift, or sale of drugs in the room. The "residue" and "paraphernalia" referenced by the People were only evidence of measuring and packaging in this instance, not indicia of use, as we have said.

For these reasons, we conclude that the conviction on count 2 was not supported by sufficient evidence. The conviction on that count is reversed.

II. Fees and penalties for maintaining a place

Pursuant to Health and Safety Code section 11372.5, the court ordered Wilson to pay a $50 drug lab fee and a $140 penalty assessment as part of his sentence for maintaining a place for selling drugs. The parties agree that this fee and assessment should be stricken because they do not apply to that offense. Pursuant to Health and Safety Code section 11372.7, the court ordered Wilson to pay a drug program fee of $100

and another penalty assessment of $280. The parties agree that this fee and assessment should have been stayed under section 654 because the remainder of the sentence for that count was stayed.

In light of our reversal of the maintaining-a-place conviction, this issue is moot.

III. Sufficiency of evidence for gang offense and enhancements

Wilson argues that the prosecution did not present sufficient evidence to prove the gang offense defined in section 186.22, subdivision (a), or the gang enhancement defined in section 186.22, subdivision (b).

A. Section 186.22, subdivision (a)

Section 186.22, subdivision (a), provides:

> "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

To prove that a defendant "'actively participates'" in a gang, the prosecution must show participation that is "more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) The active participation must also be shown to be current, meaning "at or reasonably near the time" of the felonious criminal conduct that the defendant promotes, furthers, or assists. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.) Wilson contends that the evidence did not show his participation was active or current on March 2, 2010.

We disagree. Wilson claimed gang membership seven times to booking officers, most recently in 2008, 21 months before his arrest in this case. During those 21 months, Wilson was ordered to spend a year in county jail as a condition of probation in case No. BF123662A, so he had even fewer than 21 months of freedom between the time of his last admission of gang membership and the commission of the current offense. Further, there was physical evidence of Wilson's current gang participation at the scene of the current offense itself: the sign and note bearing Wilson's gang moniker, Holiday.

The possession-for-sale offense was a characteristic gang crime, according to the police expert. When confronted with a seven-time admitted gang member, bearing gang tattoos, committing a characteristic gang crime in a room where a sign and another writing showed his gang moniker, the jury could reasonably find that the defendant was a current, active participant in a gang.

Wilson argues that the evidence that he claimed gang membership seven times while being booked into jail shows nothing because he "could have claimed to be a County Boy Crip (if in fact this is what he actually claimed as opposed to what was written down or how it was interpreted by Officer Champness) out of an abundance of caution for his safety due to being acquainted with some Country Boy Crips, and not because he was a member of the gang himself. This is the logical inference because [Wilson] has never been a documented gang member."

The idea that Wilson claimed he was a Country Boy Crip even though he was not is contradicted by the other evidence. Wilson had gang tattoos on his arms and a sign and a note with his gang moniker in his room. As for not being a "documented gang member," Wilson appears to mean that he was never before ordered to *register* as a gang member. There is, of course, no requirement that a defendant must be a registered gang member before he can be found to have violated section 186.22, subdivision (a).

Wilson says the tattoos on his arms do not show gang membership because "[i]t appears just as likely that this was actually a tattoo of a former girlfriend's initials." It is not just as likely. The prosecution presented photographs of the tattoos; opinion testimony that the letters were "C" and "B" and that many County Boy Crips had tattoos like these; and a photograph of another Country Boy Crip with similar tattoos in the same places on his arms. On the other side of the balance was only defense counsel's opinion that the "C" looked like a "G" and a witness's remark that Wilson once had a girlfriend named Gina, whose last name was unknown. The evidence that the tattoos were indicative of Country Boy Crips membership was strong, and the evidence that they stood for someone named Gina B. was nearly nonexistent.

Wilson next argues that the evidence did not prove he had knowledge that members of his gang "engage in or have engaged in a pattern of criminal gang activity …." (§ 186.22, subd. (a).) Again, we disagree. The parties stipulated that the Country Boy Crips are a criminal street gang within the meaning of section 186.22. The court instructed the jury that members of the Country Boy Crips have engaged in a pattern of criminal gang activity. Officer Champness testified that members of the Country Boy Crips were aware of the gang's pattern of criminal gang activity. Since Wilson was shown to be a current, active participant in the County Boy Crips, the jury could infer that he also had knowledge of the gang's criminal activities. Further, the current offense was a characteristic gang offense that Wilson committed while items bearing his gang moniker were in his room. Champness testified about other incidents in which Wilson was arrested with drugs in his possession and stopped while in the company of fellow gang members. In light of all this, the jury could reasonably find that Wilson was not under the mistaken impression that the Country Boy Crips are law-abiding, but instead was aware of the fact that they engage in a pattern of criminal gang activity.

Finally, Wilson argues that the prosecution did not prove that he "willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of" his gang. (§ 186.22, subd. (a).) His argument is based on the view that this language requires proof that *other* gang members committed an offense and that the defendant aided and abetted that offense. In the present case, the only offenses proved were Wilson's own current offenses in which no other gang members were shown to be involved; so under this view, a violation of section 186.22, subdivision (a), cannot be established.

This court has rejected the view on which Wilson relies. (*People v. Ngoun* (2001) 88 Cal.App.4th 432, 436-437; *People v. Salcido* (2007) 149 Cal.App.4th 356 (*Salcido*).) We concluded that the element that requires promoting, furthering, or assisting in felonious criminal conduct by gang members can be established by proof that the defendant was a direct perpetrator of that felonious conduct. It is not necessary to show

that there was another gang member who committed an offense and that the defendant aided and abetted that other gang member. (*Ngoun, supra*, at p. 436; *Salcido*, *supra*, at pp 367-368.) Our reasoning was that we could not rationally ascribe to the Legislature "the intention to deter criminal gang activity by the palpably irrational means of excluding the more culpable and including the less culpable participant in such activity." (*Ngoun, supra,* at p. 436.) We stand by this conclusion now. The Fourth District Court of Appeal reached the same conclusion in *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1301-1308.

Wilson argues that our view in *Ngoun* and *Salcido* and the court's view in *Sanchez* are in conflict with remarks made by the Supreme Court in *People v. Castenada*, *supra,* 23 Cal.4th at page 749: "[S]ection 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members …." Similarly, "[A] person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members." (*Id.* at p. 750.) In *Salcido*, we stated that these remarks are "often misinterpreted" and do not mean what they may appear to mean on the surface. (*Salcido*, *supra*, 149 Cal.App.4th at p. 367.) They are "part of the Supreme Court's explanation that section 186.22, subdivision (a), avoids punishing mere association with a disfavored organization and satisfies the due process requirement of personal guilt …." (*Ibid.*) The Supreme Court did not intend, in our view, to hold that a defendant cannot satisfy the element requiring him to further a felony by committing that felony himself instead of helping someone else commit it. That would be an absurd result. When interpreting statutes, we avoid interpretations that would lead to absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

This issue is currently pending in the California Supreme Court. (*People v. Rodriguez*, review granted Jan. 12, 2011, S187680.)

B. Section 186.22, subdivision (b)

Section 186.22, subdivision (b), provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members …." Wilson argues that the prosecution failed to present sufficient evidence to prove the enhancement allegations against him. We hold that the evidence was sufficient.

Wilson first argues that the evidence did not prove that he committed the current offense for the benefit of, at the direction of, or in association with his gang. He points out that Officer Champness testified that if a Country Boy Crips member possessed cocaine base for sale, the offense would be for the benefit of, at the direction of, or in association with the Country Boy Crips. Wilson argues that this testimony is not substantial evidence that *he* possessed the cocaine base for sale for the benefit of, at the direction of, or in association with the Country Boy Crips, because it was not proved that he was a member of the gang. He relies on the argument discussed above that the prosecution did not show that he was a current, active participant in the gang.

As we have already explained, there was substantial evidence that Wilson was a current, active participant in the Country Boy Crips. In particular, the fact that the room contained materials bearing his gang moniker warrants mentioning again here. The jury could reasonably find that Wilson possessed the drugs for the purpose of sale for the benefit of and in association with his gang.

Wilson next argues that the prosecution failed to show by substantial evidence that he acted with the specific intent to promote, further, or assist in any criminal conduct by gang members. This argument is based on the view, discussed above, that the "promote, further or assist" language requires proof that a defendant acted in concert with other gang members, whom he aided and abetted. We reject this argument for the reasons already stated. It is no more likely that the Legislature intended to punish aiders and

abettors more severely than direct perpetrators under section 186.22, subdivision (b), than that it intended this under section 186.22, subdivision (a).

IV. Section 4019 conduct credits

Wilson argues that the trial court violated the equal protection provisions of the state and federal Constitutions by failing to award presentence conduct credits in case No. BF131206A based on the formula in a version of section 4019 that became effective after the date of his current offenses. The Supreme Court recently rejected the argument on which Wilson relies. (*People v. Brown* (2012) 54 Cal.4th 314 (*Brown*).)

On March 2, 2010, the date of Wilson's crimes, section 4019 provided that if a prisoner in county jail before sentencing complied with the jail rules and performed labor as assigned, then the prisoner would receive six days' credit for each four days in custody. (Former § 4019, subd. (f).) In other words, the prisoner would get one day off for each two days served. Effective July 1, 2011, the Legislature amended section 4019 to increase the credits, with exceptions not here applicable, to one day off for each one day served. (Stats. 2011, ch. 15, § 482.) Wilson was sentenced on May 12, 2011. The court calculated credits in accordance with the version of section 4019 in effect at that time, i.e., at the rate of six days of credit for each four days served.

Brown was decided on June 18, 2012, after the parties' briefs in this appeal were filed. The Supreme Court held that equal-protection principles do not require the amended statute to be applied retroactively. (*Brown, supra*, 54 Cal.4th at p. 330.) The court's reasoning was that the Legislature's purpose in increasing the incentive for good behavior is "not served by rewarding prisoners who served time before the [additional] incentives took effect and thus could not have modified their behavior in response." It followed that prisoners in custody before the amended statute took effect and those in custody afterwards were not similarly situated for equal-protection purposes. (*Id.* at pp. 328-329.)

Brown disposes of this issue. The trial court did not err in its calculation of presentence conduct credits.

V. Misapplication of section 2933.1

In the abstract of judgment, the trial court checked a box indicating that section 2933.1 applied to Wilson's presentence conduct credits in case No. BF131206A. Section 2933.1 limits presentence conduct credits to 15 percent of the time in custody for violent felonies. At the same time, the court did not check the box showing that credits were awarded pursuant to section 4019. Wilson and the People agree that Wilson's current offenses are not violent felonies within the meaning of section 2933.1, and that the abstract should show that credits were awarded pursuant to section 4019, not section 2933.1. We order the abstract of judgment to be amended to correct the error. The correction does not affect the amount of credit actually awarded, which Wilson does not challenge.

VI. Driver's license suspension

As part of the sentence for possession of cocaine base for sale, the trial court suspended Wilson's driver's license for one year beginning March 7, 2011, pursuant to Vehicle Code section 13202. Vehicle Code section 13202 provides for license suspension when a defendant is convicted of an offense related to controlled substances and "the use of a motor vehicle was involved in, or incidental to, the commission" of the offense. (Veh. Code, § 13202, subds. (a), (b).) Wilson argues that this was error, because there was no evidence connecting a vehicle with the offense.

The evidentiary standard for a showing of vehicle use "incidental" to a crime is low. "'[I]ncidental' implies only a weak or even unintentional connection; it may be defined as 'subordinate, non-essential, or attendant in position or significance ….' [Citation.]" (*People v. Monday* (1990) 224 Cal.App.3d 1489, 1492.) Use of a vehicle can properly be found to be incidental to an offense even if the vehicle was not "used" "in" the offense within the meaning of Vehicle Code section 13350. (*Monday, supra*, at p. 1493.) The court in *Monday* concluded that vehicle use was incidental to a drug-possession offense where the defendant possessed the drugs on his person while driving his car. (*Id.* at p. 1491.)

The People argue as follows:

> "[Wilson's] use of a motor vehicle was incidental to the commission of his offenses. [Wilson] was originally contacted by law enforcement when he was driving his vehicle. He possessed $425 and a hotel key card on his person to access the room in which his cocaine base was presently located. Although [Wilson] did not possess any narcotics while in his vehicle like in *Monday*, he possessed *access* to his contraband while in his vehicle. The court could reasonably find that the vehicle was used to travel to and from the hotel. The amount of contraband that [Wilson] possessed could have easily been transported in his vehicle."

The only link between Wilson's car and the crimes is that he had the key to the room where the drugs were found in his pocket while he was driving. This is not enough. If having "access " by car to contraband were enough to trigger Vehicle Code section 13202, then the provision would apply in every case in which a defendant commits a drug offense and has access to a car, regardless of whether there is any evidence that the defendant ever used the car to travel to or from or with the drugs.

The People argue that Wilson should not be allowed to raise this issue on appeal because he did not object in the trial court. Wilson argues that, in light of the lack of evidence linking the car to the crimes, the license suspension was an unauthorized sentence and falls within the rule that unauthorized sentences can be challenged for the first time on appeal. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

The rule that an unauthorized sentence can be raised for the first time on appeal does not mean that any sentence claimed to be improperly imposed can be challenged for the first time on appeal. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A sentence is "generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*Ibid.*) Claims that are waived by failure to raise them in the trial court are those that "involve sentences which, though otherwise

permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid.*) Examples include the imposition of probation conditions said to be unreasonable (*id.* at p. 355), and "cases in which the stated reasons [for the sentence] allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons" (*id.* at p. 353). In general, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*Id.* at p. 356.)

We agree with Wilson that the license suspension was unauthorized and can be raised for the first time on appeal. There is no dispute about the facts: The only link between the crimes and Wilson's car is that he had the room key in his pocket while driving. Our holding is that, in light of those facts, the court could not, as a matter of law, find that any vehicle use was incidental to the offenses. The dispute is not about the court's choice of options within the range of its discretion. There is nothing the court could have done to avoid error, short of not imposing the suspension, if defense counsel had brought the matter to the trial court's attention. For these reasons, the matter is suitable for resolution on appeal despite the lack of objection in the trial court.

The license suspension is reversed.

VII. Restitution fine

In the violation-of-probation case (No. BF123662A), the court imposed a restitution fine of $200 pursuant to section 1202.4, subdivision (b). Wilson argues that the abstract of judgment is confusing on this point and could be interpreted to mean that he must pay two restitution fines of $200 each under section 1202.4, subdivision (b). He requests that the abstract be corrected or clarified.

Item 9 of the abstract of judgment states that Wilson must pay a restitution fine of $200 pursuant to section 1202.4, subdivision (b). Item 11 of the abstract states: "THE TOTAL UNPAID BALANCE OF $200.00 IS DUE PER PC 1202.4(B)." We agree with

the People that the abstract clearly indicates a $200 restitution fine under section 1202.4, subdivision (b), with the entire balance, $200, unpaid. The abstract is not incorrect or unclear. No modification is needed.

VIII. Date of offense in violation-of-probation case

The abstract of judgment in the violation-of-probation case (No. BF123662A) shows the date of conviction for the underlying offense, possession of a firearm by a felon, as March 7, 2011. The parties agree that the correct date is September 2, 2008. We order the court to correct the error.

DISPOSITION

The conviction on count 2, maintaining a place for selling, giving away, or using a controlled substance, is reversed. The driver's license suspension imposed under Vehicle Code section 13202 is also reversed.

In addition, the superior court shall modify the abstract of judgment as follows: (1) the designation of section 2933.1 as the basis of the award of conduct credits must be removed and section 4019 must instead be shown as the basis of the conduct credits awarded; and (2) the correct date of conviction, September 2, 2008, must be shown for the violation of former section 12021, subdivision (a)(1). The superior court shall forward the amended abstract to the appropriate prison authorities.

The judgment otherwise is affirmed.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Gomes, J.

_____
Poochigian, J.